LAW SOCIETY OF ZIMBABWE
versus
TAPERA SENGWENI

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 30 May 2018 & 27 June 2018

Opposed Application

Adv T Magwaliba, for the applicant
D Mwonzora, for the respondent

CHIKOWERO J: The parties have been on each other's throat since 2012.

Their efforts have yielded three High Court orders. The Legal Practitioners Disciplinary Tribunal weighed in with one more, a de-registration order.

This judgment is the fifth in the series.

On 18 October 2013 the Legal Practitioners Disciplinary Tribunal, acting in terms of s 28 (1) (a) (i) of the Legal Practitioners Act [*Chapter 27:07*], ordered that respondent's name be deleted from the register of Legal Practitioners, Notary Publics and Conveyancers in Zimbabwe.

This was pursuant to disciplinary proceedings wherein respondent was found guilty of unprofessional, dishonourable and unworthy conduct. It had been alleged that he embezzled trust funds.

On 2 November 2016 this court granted him condonation for late filing of an application for review of the de-registration order. He was allowed five days from the date of the granting of the order within which to file his application for review.

Although the application was vigorously opposed, there was no appearance for the Law Society of Zimbabwe on the date of hearing. The relief sought was thus granted in default.

The application for review was duly filed. No opposing papers were filed. Consequently, on 30 November 2016 the relief prayed for was granted. This court ordered that the present respondent's name be re-registered in the register of legal practitioners of Zimbabwe. There was no order as to costs. This order, too, was granted in default. The Law Society of Zimbabwe was not in attendance.

On 23 February 2017 an application for rescission of judgment and extension of time within which to file opposing papers to the application for review was filed.

Opposing papers were issued and served. Come the date of hearing, however, the respondent was in default.

Advocate *T Mpofu* appeared for the applicant. He moved the court to grant an order as prayed. This was on 12 July 2017.

The default judgment against the applicant was rescinded. The failure to file papers opposing the application for review was condoned. Five days were allowed, from the date of the granting of the order, within which to file such opposing papers.

The five days expired on 19 July 2017.

The applicant had not filed the opposing papers.

The papers opposing the application for review were eventually filed on 7 August 2017.

By then the applicant was thirteen days out of time.

On 7 November 2017 applicant then filed an application for condonation for late filing of the opposing papers.

This is the application which is the subject of this judgment. The factors to be considered in an application of this nature are set out in numerous judgments emanating from this court and the Supreme Court. The approach which the court should follow is also settled.

I refer to two such decisions only: *Florence Chimunda v Arnold Zimuto and Loveness Zimuto* SC 76/14; *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (HC).

I will travel the same route. The degree of non-compliance with the court order of July 12th 2017 was thirteen days. That is not an inordinate delay. There was a further period of delay. It was

the period it took the applicant to file the present application. The same only saw the light of day on 7 November 2017. When the 2017 High Court of Zimbabwe Mid-term vacation and weekends are excluded, one is left with a period of around sixty working days between 19 July 2017 and 7 November 2017.

It is undeniable that the applicant should have brought the present application much earlier than it did. At the same time, it is noted that the opposing papers were filed. This court cannot shut its eyes to that fact. They were filed just under two weeks out of time.

Advocate *T Mpofu* was in court on 12 July 2017 and knew that applicant had up to 19 July 2017 to file papers opposing the application for review. In the circumstances, I accept as reasonable the explanation that Advocate *T Mpofu* returned the brief to the applicant with no memorandum. This would account for filing of the notice of opposition and opposing affidavit on the fourth working day from the date that the court order of 12 July 2017 was uplifted.

As for the period between the filing of the opposing papers and the filing of the application for condonation, I have noted that the explanation only emerges from applicants answering affidavit. Applicant states that it was at the Council meeting of 27 October 2017 held at Zvishavane that a recommendation was adopted to apply for condonation.

Those minutes are not signed. The explanation is contained in the answering affidavit. Its proper place should have been the founding affidavit.

This is clearly unsatisfactory.

In any event, having realized that it was out of time at the time that it filed its opposing papers there was clearly no reason for applicant to wait until 27 October 2017 for the go ahead to file the application for condonation.

In an application of this nature, however, no single factor is decisive. Thus in *United Plant Hire (Pty) Ltd* v *Hills and Others* 1976 (1) SA 717 (A) HOLMES JA said at p 720G:

> "…..These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong."

This court per CHIDYAUSIKU J (as he then was) accepted this to be a correct statement of the approach to be taken in our own jurisdiction in *Bishi* v *Secretary for Education (supra*).

In my judgment, I find that the following factors compensate for the delay in filing this application and the poor explanation therefor:

- the slight delay in filing the opposing papers.
- the explanation for that slight delay.
- the importance of the case.
- the need for finality to litigation.
- the convenience of the court.
- the prejudice to the respondent.
- the prospects of success of the application for review.

I have already dealt with the first two factors.

There can be no doubt that this is an important case. As a statutory body mandated by law to regulate the legal profession, it is vital that the applicant be heard in resolving the disputes disclosed in the application for review. One of its members, the respondent, has been de-registered. The application for review challenges that de-registration.

This approach is in line with the fundamental human rights and freedoms espoused in the Constitution of Zimbabwe Amendment (No. 20) Act, 2013. Section 69 (3) thereof provides that:

> "Every person has the right of access to the Courts, or to some other tribunal or forum established by law for the resolution of any dispute."

I remain unpersuaded that I should shut the doors of the Court in the face of the applicant in the circumstances of this matter. The *audi alteram partem* principle is a fundamental tenet of natural justice. I will allow applicant to be heard in the application for review.

The matter is also important for another reason. Legal practitioners are by law only allowed to practise law if they are and remain fit and proper persons to do so. They should not practise law by default. Where, therefore, the respondent has been found guilty of misconduct and de-registered, and is challenging such determination and penalty, it is important that the challenge be subjected to contestation before the matter is disposed of.

The application for review has implications beyond these litigants. Members of the public have an interest in the outcome of the application for review whatever that outcome turns out to be. They need protection from errant legal practitioners. They also have a constitutional right to

be legally represented by counsel of choice. It is therefore in their interest that the respondent should not remain excluded from that pool of legal practitioners unless the exclusion is legally justified. The application for review holds the key to settle this issue once and for all.

The legal battles between the parties have dragged on for too long. Litigation must end at some point. The opposing papers have been filed. All that needs to be done therefore is to file Heads of Argument and set down the application for review for hearing

Condonation of the late filing of the opposing papers thus avoids any further unnecessary delay in finalising the real dispute between the parties. Applicant's prospects of success in the application for review appear to be good for several reasons. I highlight some of them.

The respondent contends that the order by the Legal Practitioners Disciplinary Tribunal was granted in default. He claims he was never served with the application itself. He claims also that he was not represented before that Tribunal. He therefore disowns Advocate Uriri, who is reflected on p 39 of his own application for review to have made a number of applications for postponement on the respondent's behalf, and to the respondent's benefit. If the respondent's contention is correct, then his application for review is doomed to fail. He ought to have applied for rescission of the order made by the Legal Practitioners Disciplinary Tribunal, rather than seeking review of that order.

Further, he in another breath in fact accepts that the tribunal's order was not a default judgment. He applied for condonation for late filing of an application for review. He was granted that condonation. The court order for condonation is extant. His application for review is testament thereto.

He also strikes at the heart of the tribunal's order. He does this by alleging that that body was improperly constituted. If this argument succeeds, then the tribunal's order would be null and void. That would conclude this matter. Standing in respondent's way is s 24 (2) of the Legal Practitioners Act [*Chapter 27:07*] which establishes the Legal Practitioners Disciplinary Tribunal. It reads:

> "The Disciplinary Tribunal shall consist of:
>
> (a) A Chairman and a Deputy Chairman who shall be judges of the High Court or the Supreme Court or are retired judges of the High Court or the Supreme Court, and shall be appointed by the Chief Justice;

(b) Two other members selected from time to time as the need arises, by the Chairman of the Disciplinary tribunal from a panel of names of ten registered legal practitioners submitted by the council of the society."

The respondent's contention that the tribunal is properly constituted by three and not four members does not bear scrutiny.

All that is there in his application for review is a bare allegation that each and every one of the four members who constituted that tribunal ought not to have been there. In my view, he is likely to have a hard time convincing the review court to accept this argument. I have not seen any evidence in his application for review for me to be inclined otherwise.

Further, applicant did not attach the register of legal practitioners to his application for review to substantiate his averment that the third and fourth members of the tribunals were not legal practitioners. It is unlikely that the review court will accept that the Chief Justice and the two High Court judges who sat on that tribunal all erred by not observing that tribunal members three and four were not legal practitioners. They in fact are senior and well known legal practitioners in Zimbabwe. The two are Mr *Davison Kanokanga* of Kanokanga & Partners and Mrs *Moyo* of Honey & Blackenberg.

Page 39 of the application for review reflects undertakings made by the respondent through Advocate *Uriri* to reimburse the trust funds. The postponements were granted on the basis of those undertakings. It would appear the respondent is desperate to avoid the application for review from being heard on the merits. He does not traverse these damaging aspects in his application. He is content to disown the authenticity of the proceedings, Advocate's *Uriri'*s mandate, label the application and the members of the tribunal as "bogus" and expect the review court to accept his mere say so despite the existence of documentary evidence to the contrary.

Without prejudging the application for review, I have not accepted respondent's argument that it is the Secretariat and not the Council of the Law Society of Zimbabwe which referred the respondent's matter to the tribunal. Neither have I upheld his point *in limine* that the secretariat is representing the applicant in this matter.

It is only proper that the parties be given an opportunity to present their argument before this court on review. As regards the Secretariat and not the applicant being before me, nothing has

been put before me to suggest that the deponent to the applicant's founding affidavit, Mr Wilbert Mandinde, is on a frolic of his own. As I see the history of this matter, the parties have always been the present litigants.

In the result, I am satisfied that good cause has been shown to justify condoning the delay in filing applicant's opposing papers to the application for review,

I therefore order as follows:

1. The application for condonation for late filing of the notice of opposition in case number HC 11454/16 be and is hereby granted.
2. The notice of opposition and opposing affidavit filed by the applicant on 7 August 2017 be and are hereby deemed to be part of the record in case number HC 11454/16
3. There is no order as to costs.

The Law Society of Zimbabwe, applicant
Mwonzora & Associates, respondent's legal practitioners